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No. 88-_____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

HERMAN SOIFER,

Petitioner,

—v.—

BANKERS TRUST COMPANY, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. Did the Court of Appeals err in holding that any person injured in fact had standing to assert a civil claim under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961 *et seq.* ("RICO"), and in reversing the dismissal of a RICO complaint by a creditor against the officers of a corporation subject to a pending bankruptcy proceeding for damages attributable to the depletion of the corporation's assets?

2. Did the Court of Appeals, in applying the rule of separate accrual to govern the period of limitations applicable to RICO claims, err in holding that the period does not begin to run until the termination of other proceedings which may reduce the damages recoverable in a RICO action and in directing that the dismissal of a creditor's RICO action filed more than six years after the creditor first sought relief in a bankruptcy proceeding for the same wrongdoing be without prejudice to the filing of a new action by the creditor after the termination of the bankruptcy proceeding?

PARTIES TO THE PROCEEDINGS

The parties to the proceedings below were the petitioner Herman Soifer and the respondents Bankers Trust Company, Daniel Rhoades and Milton Braten. In the Court below, Soifer, Rhoades and Braten were appellees and Bankers the appellant.

Petitioner has no parent companies, subsidiaries or affiliates, as those terms are used in Supreme Court Rule 28.1.

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IN THE

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HERMAN SOIFER,

Petitioner,

—v.—

BANKERS TRUST COMPANY, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner Herman Soifer respectfully prays that a writ of certiorari be issued to review a judgment of the United States Court of Appeals for the Second Circuit which reversed a judgment of the United States District Court for the Southern District of New York dismissing this action.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit (App. 1a-25a)[1] is reported at 859 F.2d 1096 (1988). The opinions of the United States District Court for the Southern District of New York dismissing the complaint are reported at 676 F. Supp. 496 (S.D.N.Y. 1987) (App. 27a-40a) and 648 F. Supp. 17 (S.D.N.Y. 1986) (App. 41a-75a).

1 References to "App." are to the Appendix submitted with this Petition.

JURISDICTION

The judgment of the Court of Appeals was entered on October 3, 1988 (App. 26a-1-26a-2). Soifer's petition for rehearing and suggestion for rehearing *en banc* was denied by order entered November 14, 1988 (App. 26a). This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTE INVOLVED

The statutory provisions involved in this proceeding are relevant portions of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), Title IX of the Organized Crime Control Act of 1970, as amended, 18 U.S.C. §§ 1961-1964 (1978) (App. 76a-88a).

STATEMENT OF THE CASE

Respondent Bankers Trust Company ("Bankers"), one of many creditors of Braten Apparel Corp. ("BAC"), charges that in August 1974, various individuals caused BAC to file a bankruptcy proceeding during which they fraudulently concealed its ownership of Brookfield Clothes, Inc. ("Brookfield"), an asset worth in excess of $3 million. Bankers asserts that in March 1976, the creditors of BAC were induced to accept a plan of arrangement under which they would have received only 17.5% of their allowed claims and BAC would have been relieved of more than $4.3 million in debts. By September 1976, after it became aware of the alleged concealment, Bankers moved in the bankruptcy court to revoke BAC's plan, alleging that it had been procured by fraud. In June 1982, the bankruptcy court revoked the plan and reinstated the bankruptcy proceeding which, as of this date, remains pending.

Bankers commenced this RICO action in August 1982, bypassing the bankruptcy proceeding in which it had litigated essentially the same claims for the prior six years. In addition to asserting claims concerning the Brookfield concealment, Bankers also sought to recover more than $100,000 in legal fees

which it claimed to have incurred in defending frivolous lawsuits and asserted that, as a result of certain conveyances in 1981-82, funds which might have been used to pay the wrongfully discharged portion of Bankers' debt had been fraudulently transferred. 859 F.2d at 1099, 1106; App. 6a, 20a.

In 1983, the District Court entered a judgment dismissing the complaint for failure to state a claim, holding that the civil provisions of RICO provide relief only for a "distinct RICO injury" caused by a pattern of racketeering activity rather than by the predicate acts that constitute the pattern. 566 F. Supp. 1235. In 1984, the Second Circuit affirmed that dismissal. 741 F.2d 511. In 1985, this Court vacated that judgment in light of *Sedima S.P.R.L.* v. *Imrex Co.*, 473 U.S. 479 (1985) and remanded for further proceedings. 473 U.S. 922.

In 1986, following that remand, the District Court dismissed most of the claims against Soifer on limitations grounds. It did not dismiss Bankers' conspiracy claim, finding that the action was timely in this regard. 648 F. Supp. at 37; App. 71a. In 1987, it dismissed the entire action on the ground that Bankers had no standing under RICO to pursue claims arising from the discharge of its debt and that, insofar as Bankers had standing to pursue claims for legal fees, its claim was time-barred. 676 F. Supp. at 503, 504; App. 35a, 37a.

In 1988, the Second Circuit reversed. 859 F.2d at 1098; App. 3a.[2] As to standing, it held that any person injured in fact may sue under RICO even though that person would have no standing to pursue an action under other applicable statutory or common law. *Id.* at 1100-01; App. 8a-11a. As to limitations, it adopted a so-called rule of separate accrual under which "each time a plaintiff suffers an injury caused by a violation of 18 U.S.C. § 1962, a cause of action accrues to the plaintiff at the time he discovered or should have discovered the injury." *Id.* at 1102; App. 13a. In applying that rule, it held that where dam-

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2 The Second Circuit (859 F.2d at 1105-06; App. 20a-23a) characterized the claim that a portion of Bankers' debt had been wrongfully discharged in 1976 as the "loss of a legitimate debt" claim; the claim that Bankers had incurred legal expenses for which it should be reimbursed as the "past legal fees" claim; and the claim for additional funds which Bankers might expend to trace lost assets as the "future injury" claim.

ages "are 'unrecoverable' . . . because 'their accrual is speculative' and 'their amount and nature unprovable'," no claim will accrue therefor and, at such future time as "the damages do become definite, a claim will accrue, and plaintiff will have four years to bring an action for recovery." *Id.* at 1106; App. 21a-22a.

SUMMARY OF ARGUMENT

Bankers' loss of a legitimate debt claim belongs to BAC. Unless the bankruptcy court otherwise orders, neither Bankers nor any other creditor of BAC may pursue, on its own behalf, the right to secure payment of any indebtedness owed by BAC. The Court below incorrectly conferred standing on Bankers to pursue its RICO claim.

Even if Bankers had standing to pursue its loss of a legitimate debt claim, its dismissal with prejudice should have been affirmed. That claim is time-barred, and the pendency of the BAC bankruptcy proceeding did not render that claim speculative and unprovable so as to warrant the deferral of its accrual until the termination of that proceeding.

REASONS FOR GRANTING THE WRIT

I. THE CONFLICT BETWEEN THE SECOND CIRCUIT AND THE FIFTH AND SEVENTH CIRCUITS AS TO WHETHER STANDING LIMITATIONS APPLY TO RICO PRESENTS AN IMPORTANT ISSUE OF FEDERAL LAW THAT WAS INCORRECTLY DECIDED BELOW

In its decision, the Second Circuit refused to impose any meaningful standing limitations on RICO claims. In its view, any person "injur[ed] in fact" may sue under RICO even though that person would have no standing to pursue an action under other applicable provisions of statutory or common law. As applied here, this injury in fact principle improperly enables a creditor to bring a civil RICO action against the officers of a

corporation for injuries sustained as a result of the depletion of the corporation's assets. 859 F.2d at 1101; App. 9a-10a.

A. Traditional Standing Limitations Are Applicable To RICO

Most Circuits consistently apply standing limitations in affirming the dismissal of RICO claims.[3] Thus, *Carter v. Berger*, 777 F.2d 1173, 1176 (7th Cir. 1985), rejected the standing of a taxpayer to seek relief under RICO for harm arising from payment of increased taxes due to defendant's fraud on the taxing authorities. *Carter* supports the proposition that an indirectly injured party must look to the recovery of the directly injured party, not to the wrongdoer, for relief. *Accord*, *NCNB National Bank v. Tiller*, 814 F.2d 931, 937 (4th Cir. 1987).

In *Bass v. Campagnone*, 838 F.2d 10 (1st Cir. 1988), members of a labor union claimed deprivation of effective representation because of the corruption of certain union officials. The First Circuit held that the inquiry is whether plaintiff "has alleged an injury that 'flows from' the predicate acts." *Id.* at 12 (*quoting Sedima*, 473 U.S. at 497). Noting that plaintiffs alleged no injury peculiar to them which did not fall equally upon other union members, the Court held that the union was the only appropriate plaintiff. *Id.* at 13.

Adams-Lundy v. Association of Prof. Flight Attendants, 844 F.2d 245 (5th Cir. 1988) (*per curiam*), involved a claim by a majority of the members of a labor union's board. After they

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3 Contrary to the view of the Court below (859 F.2d at 1100; App. 9a), nothing in *Sedima*, 473 U.S. at 497, may be read to support the conclusion that standing to assert civil claims under RICO may not be limited. *Sedima* did not address whether all parties claiming some injury from the same acts may seek relief under RICO. *Sedima* concerned whether any party could sue for an "injury resulting from the predicate acts themselves." 473 U.S. at 494. As stated in *International Data Bank, Ltd. v. Zepkin*, 812 F.2d 149, 153-54 (4th Cir. 1987) (holding that a corporation which neither bought nor sold securities had no standing to bring a RICO claim based on securities fraud):

> [T]he application [to RICO claims] of traditional standing requirements for securities fraud does not violate [*Sedima*'s rejection of] an across-the-board standing restriction, derived from the antitrust laws, that would apply to RICO claims no matter what the predicate offenses.

had been suspended by the board's minority members, they brought an action under RICO alleging various financial improprieties. The Fifth Circuit assumed that the board members' claims were correctly analogized to claims by stockholders and, rejecting the argument that *Sedima* mandates unlimited standing, held that plaintiffs lacked standing because defendants' alleged wrongs "directly injured solely the union." *Id.* at 250 & n. 32.

In *Leach v. Federal Deposit Insurance Corp.*, 860 F.2d 1266, 1273-74 (5th Cir. 1988), the Fifth Circuit held that minority shareholders of a bank had no standing to assert RICO claims for the diminution of the value of their shares arising from mismanagement of the Bank's affairs by the defendant directors. It noted that its decision was consistent with *Adams-Lundy* as well as with *Crocker v. Federal Deposit Insurance Corp.*, 826 F.2d 347 (5th Cir. 1987), *cert. denied*, ____ U.S. ____, 108 S. Ct. 1075 (1988) (holding that "minority shareholders lacked standing under RICO to sue because they had not alleged any injury to their property that was distinct from any injury the corporation may have suffered").[4] *See also Roeder v. Alpha Industries, Inc.*, 814 F.2d 22, 29-30 (1st Cir. 1987) (RICO class action by purchaser "not the proper vehicle for shareholders to obtain redress" for injury to corporation) and *Sparling v.*

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4 As noted in *Leach* (860 F.2d at 1274 n. 15), its holding was consistent with *Rand v. Anaconda-Ericsson, Inc.*, 794 F.2d 843, 845 (2d Cir.), *cert. denied*, 479 U.S. 987 (1986). *Rand* recognized that RICO, like the antitrust laws, is subject to standing limitations, even though neither contains any statutory standing requirements. In *Rand*, stockholders alleged that a creditor had wrongfully forced their corporation into bankruptcy. In holding that plaintiffs lacked standing to seek relief under the Sherman Act and under RICO, the Second Circuit relied upon a case where

> as in the instant case, a stockholder/creditor sued under the antitrust laws, alleging that his stock was rendered worthless and that his claim against the company was only partially satisfied because defendants' alleged antitrust violation drove the company into bankruptcy. 794 F.2d at 849.

The Court below concluded that the rationale of *Rand* was not applicable here because Bankers was a creditor, and not a stockholder, of BAC. 859 F.2d at 1101; App. 10a.

Hoffman Construction Co., 1988 WL 135641, 8-9 (9th Cir. Dec. 21, 1988).

In *Warner v. Alexander Grant & Co.*, 828 F.2d 1528, 1530 (11th Cir. 1987), the Eleventh Circuit affirmed the dismissal of a RICO claim on the ground that plaintiff's alleged injuries were not personally sustained by him but were sustained derivatively as a shareholder of a corporation that relied on statements claimed to have been wrongfully issued.

Standing limitations have also been imposed to support dismissal of RICO claims by discharged employees. In *Cullom v. Hibernia National Bank*, 859 F.2d 1211 (5th Cir. 1988), the Fifth Circuit held that "an employee discharged for refusing to participate in an illegal activity under RICO lacks standing to sue" because his "injury was not 'by reason of' or did not 'flow from' the commission of the predicate acts on which the RICO violation was based." *Id.* at 1212. In so doing, it relied on analogous decisions in other circuits under which "[w]histleblowers do not have standing to sue under RICO for the injury caused by the loss of their job." *Id.* at 1215, citing *Pujol v. Shearson/Am. Express, Inc.*, 829 F.2d 1201, 1204-06 (1st Cir. 1987) (affirming dismissal of RICO claim by discharged employee for lack of standing "because of the absence of the requisite connection between the injuries alleged and the 'predicate acts' pleaded in the complaint"); *Nodine v. Textron, Inc.*, 819 F.2d 347 (1st Cir. 1987) (affirming dismissal of RICO claim by discharged employee for lack of standing because no injury that resulted from the predicate offenses alleged); and *Morast v. Lance*, 807 F.2d 926, 932-33 (11th Cir. 1987).[5]

B. A Creditor Has No Right To Pursue Its Own Action During A Pending Bankruptcy Proceeding

Traditional standing limitations act to bar a creditor from pursuing its own action during a pending bankruptcy proceeding. In *In re MortgageAmerica Corp.*, 714 F.2d 1266 (5th Cir. 1983), the Fifth Circuit held that even though state law specifi-

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5 See also *Burdick v. American Express Co.*, No. 88-7216 (2d Cir. Jan. 13, 1989), and *Diamond v. Reynolds*, 853 F.2d 917 (3d Cir.), *cert. denied*, _____ U.S. _____, 109 S. Ct. 392 (1988).

cally provides that a lender may seek to recover assets improperly removed from a corporation, once the corporation subsequently becomes subject to a bankruptcy proceeding, the bankruptcy laws place that right exclusively in the hands of its trustee.

In that case, a bank had claimed that it was the specific target of a self-dealing transfer of assets by the corporate debtor's sole shareholder; the purpose of the transfer was to prevent enforcement by the bank of a judgment against the corporation. The bank advanced three theories to demonstrate why its claim against the shareholder could proceed despite the bankruptcy: (i) a creditor could sue a corporate officer for breach of trust to the creditors; (ii) an officer could be held liable for denuding the corporation of its assets; and (iii) fraudulently conveyed assets could be traced into the hands of the recipient.

The Fifth Circuit rejected the bank's contentions that these were merely private claims of a creditor to recover for fraud. It held that each of the bank's claims, however denominated, could be asserted only by a bankruptcy trustee in a proceeding for the benefit of all creditors. It stated:

> [T]his result furthers the basic, commonsense principle of pro-rata distribution that runs through virtually every substantive provision of the Code. At least in modern bankruptcy law, the day of unfair and unseemly races to the courthouse is long gone. Whatever else may be uncertain or unsettled in the construction of the new Bankruptcy Code, we think it beyond cavil that the principle of first-come-first-served has no place in bankruptcy law except to the very limited extent that specific provisions give it a place. 714 F.2d at 1278.

See also 676 F. Supp. at 501 (App. 32a-33a) and *In re S.I. Acquisition, Inc.*, 817 F.2d 1142, 1153-54 (5th Cir. 1987).

Similarly, in *Koch Refining v. Farmers Union Central Exchange, Inc.*, 831 F.2d 1339 (7th Cir. 1987), *cert. denied*, ____ U.S. ____, 108 S. Ct. 1077 (1988), plaintiffs, customers of a bankrupt oil refinery, sought a declaratory judgment that the member-owners of the refinery were liable for its debts under

an alter ego theory. In agreeing that plaintiffs lacked standing, the Seventh Circuit stated that "[t]he trustee represents not only the rights of the debtor but also the interests of the creditors of the debtor," with the sole right to pursue the claims of creditors collectively. This device is intended to "eliminate[ ] the many wasteful and competitive suits of individual creditors." *Id.* at 1342. The claims which pass to the trustee are precisely those where "the liability is to all creditors of the corporation without regard to the[ir] personal dealings." *Id.* at 1349.

The rationales of *MortgageAmerica* and *Koch* have their origins in principles recognized by courts for many decades. In the *Gochenour* cases,[6] creditors of a bankrupt corporation alleged in two separate class actions that corporate insiders had acquired the debtor's assets at a discount. One complaint alleged waste and mismanagement of the corporation; the other alleged a scheme directed at defrauding the creditors. Both actions were dismissed because, once the corporation had become subject to a bankruptcy proceeding, the creditors had no standing. At such point, any claim which, in essence, arose from a diversion of corporate assets, however denominated, belonged to the bankruptcy trustee or, in the absence of a trustee, to the debtor-in-possession. Whether acting individually or as a class, creditors had no right to pursue an independent action without express authorization from the bankruptcy court.

Few exceptions exist to the rule of no independent creditor standing. Of these, all but one require the creditor to secure permission from the bankruptcy court prior to commencing its

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6 *Gochenour v. George & Francis Ball Foundation*, 35 F. Supp. 508 (S.D. Ind. 1940), *aff'd and the opinion adopted by reference as the opinion of the Court of Appeals*, 117 F.2d 259 (7th Cir.) (*per curiam*), *cert. denied*, 313 U.S. 566 (1941). *Accord Gochenour v. Cleveland Terminals Bldg. Co.*, 118 F.2d 89 (6th Cir. 1941) (creditors' claims belonged to debtor-in-possession and were under the exclusive jurisdiction of the bankruptcy court). *See also Loeb v. Eastman Kodak Co.*, 183 F. 704 (3d Cir. 1910) (Sherman Act does not confer standing on shareholders and creditors of company injured by antitrust violation), cited in 676 F. Supp. at 500; App. 30a-31a.

own action.[7] Only a creditor claiming fraudulent inducement can sue in its own right without bankruptcy court permission. *See, e.g., Cumberland Oil Corp. v. Thropp*, 791 F.2d 1037 (2d Cir.), *cert. denied*, 479 U.S. 950 (1986) (plaintiff charged principals of a bankrupt company with conspiring to induce it to enter a contract with the company at a time when they planned to remove the company's assets, thereby destroying its ability to perform the contract);[8] *Teledyne Industries, Inc. v. Eon Corp.*, 401 F. Supp. 729 (S.D.N.Y. 1975), *aff'd on the opinion below*, 546 F.2d 495 (2d Cir. 1976) (plaintiff alleged that controlling persons of a debtor had fraudulently induced it to enter a contract which they knew the debtor could not perform).[9]

C. The Fifth and Seventh Circuits Properly Bar RICO Claims By A Creditor Of A Company Subject To A Pending Bankruptcy Proceeding

Applying the principles set forth above, most courts which have considered the issue bar RICO claims by creditors during a pending bankruptcy proceeding. Thus, in *National Enterprises, Inc. v. Mellon Fin. Serv. Corp. No. 7*, 847 F.2d 251 (5th Cir. 1988)—a case which, in many pertinent respects, is similar to

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7 Thus, a creditor must seek permission of the bankruptcy court to require the trustee or debtor-in-possession to abandon a claim, or to bring an action for itself or for the benefit of all creditors. *See, e.g., Mitchell Excavators, Inc. v. Mitchell*, 734 F.2d 129, 132 (2d Cir. 1984), citing *Dallas Cabana, Inc. v. Hyatt Corp.*, 441 F.2d 865, 868 (5th Cir. 1971); *see also Nebraska State Bank v. Jones*, 846 F.2d 477 (8th Cir. 1988) (affirming dismissal of creditor's action and noting right of creditor to move in bankruptcy court to appoint a trustee, convert a reorganization case to a liquidation case, or to compel debtor-in-possession to act or to authorize creditor to institute its own action); *Steyr-Daimler-Puch of America Corp. v. Pappas*, 852 F.2d 132, 136 (4th Cir. 1988) and 676 F. Supp. at 503; App. 35a.

8 The District Court distinguished *Cumberland*, noting that there "every creditor who had filed a claim with the bankruptcy court received full payment on their claims prior to plaintiff's suit." 676 F. Supp. at 502; App. 34a.

9 The claim in *Teledyne* was based on "specific fraudulent misrepresentations" made to plaintiff and, as such, it "belonged specifically and exclusively to the suing creditor, and neither to any other creditors nor to the insolvent corporate debtor." *MortgageAmerica*, 714 F.2d at 1277 n. 10.

the case at bar—a creditor of G&N alleged that defendant, G&N's primary lender, had depleted its funds by engaging in a kickback scheme at the same time that defendant was assuring the creditor that G&N had the necessary financing for a certain project. The Fifth Circuit concluded that the same principles of corporate law which bar stockholders from suing for wrongs to their corporation apply to "deny[ ] standing to the creditor of an alleged RICO victim." *Id.* at 254.[10] Only G&N's bankruptcy trustee, which had brought a RICO action against the same defendant (847 F.2d at 252 n. 1), could pursue such a claim.

Both under *Sedima* and "the general principles of causation," any injury to plaintiff as a G&N creditor did not "flow from" the alleged bribery. *Id.* at 254. *National Enterprises* concludes that the reference in *Sedima* to "recoverable damages" which "*flow* from" the predicate acts—the same language as quoted by the Court below (859 F.2d at 1100)—restricts standing to one injured more directly than a corporate creditor ordinarily would be. 847 F.2d at 254 (emphasis in original).[11]

The Court below described the injury to Bankers as arising from "the identical transactions that injured the bankrupt corporation." 859 F.2d at 1106; App. 21a. *See also id.* at 1101; App. 10a: "BAC might also have suffered an identical injury for which it has a similar right of recovery." Under the analysis of *National Enterprises*, Bankers has no standing under RICO to pursue its loss of a legitimate debt claim. Any right to recover belongs exclusively to BAC which, as the primary victim of the alleged wrongdoing and a party to a pending bankruptcy proceeding, is charged with acting for all creditor interests, including those of Bankers.

Moreover, the Seventh Circuit also would deny creditor standing in a RICO case such as this. *See, e.g., Barnett v. Stern*, 1988 WL 126593 (N.D. Ill. Nov. 30, 1988), concluding that, under *Koch* and *Carter*, *supra*, creditors do not have standing to bring RICO claims against the principals of a bankrupt

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10 As noted earlier, *supra* n. 4, the Court below specifically held to the contrary.

11 *Cf. Warren v. Manufacturers National Bank*, 759 F.2d 542 (6th Cir. 1985) (individual holding status as creditor, shareholder and employee of company has no standing to pursue RICO action for injury to company).

company—only the company's bankruptcy trustee may bring those claims on behalf of all creditors.[12] *Barnett* (at 8) specifically disagreed with the holding of the Second Circuit in this case that

> both the creditor and the trustee have standing to bring claims predicated on the depletion of the debtor's assets . . . . [W]hatever the law in the Second Circuit, the fact that this case arises under RICO rather than under common law provides no basis for reaching a different result here than did the Seventh Circuit in *Koch*.

Mitsubishi Electric Sales America Inc. v. Higgins, 1988 WL 124756 (N.D. Ill. Nov. 10, 1988) is to the same effect. There, citing *Koch* and *MortgageAmerica*, the Court dismissed a RICO claim by a creditor for lack of standing. The creditor alleged a conspiracy by defendants to defraud all of the creditors of a company subject to a pending bankruptcy proceeding. Because the injury to the creditor from the alleged wrongful conveyances was indirect, only the company's trustee could pursue the underlying claims for the benefit of all creditors.

The Second Circuit's refusal to impose any standing limitations here is in direct conflict with these decisions.

D. Well-Established Principles of Statutory Interpretation Support Rejection of Standing Here

The fact that Congress failed to supply explicit standing limitations for civil RICO does not support the conclusion that Congress intended that there be no standards at all, as the

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12 As *Barnett* points out, *Koch* (831 F.2d at 1343) cited *Dana Molded Products, Inc. v. Brodner*, 58 B.R. 576 (N.D. Ill. 1986) with approval. There, a creditor of American Wheel brought a RICO action alleging that defendants had improperly transferred its assets after it had filed for protection under the bankruptcy laws. The Court concluded that because plaintiff's injuries were "indistinguishable from those suffered by American Wheel itself," and also were "no different from that suffered by the other Chapter 11 creditors," plaintiff had no standing. *Id.* at 579. *See also* 676 F. Supp. at 500-03; App. 31a-35a (discussing *Dana*). Subsequently, the corporation's bankruptcy trustee brought a similar RICO action against the same defendants. *Levit v. Brodner*, 75 B.R. 281 (N.D. Ill. 1987).

Court below apparently believed. Rather, in such circumstances, courts should limit the scope of a statute to the objectives Congress clearly identified and expressly sought to achieve.

When a broad reading of a statute leads to unanticipated results, legislative intent is determined "not by the letter of the law" but by its "spirit." Such a determination takes into account not only the presence or absence of relevant legislative history but also the historical matrix from which the statute arises and the evil it is designed to remedy. *United Steelworkers v. Weber*, 443 U.S. 193, 201 (1979); *Church of the Holy Trinity v. United States*, 143 U.S. 457, 459 (1892). A particular sensitivity to context, both historical and statutory, is shown when the broad application of a general statute would disrupt an established federal regulatory scheme.

A statute should not generally be read in a manner inconsistent with other—and more specifically drawn—statutes. Here, absent expressions of Congressional intent to the contrary, RICO should not be read in a manner which disturbs the particular framework within which the bankruptcy laws traditionally operate. *See Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 153 (1976) where, in holding broad venue provisions inapplicable in actions against national banks, the Court wrote: "It is a basic principle of statutory construction that a statute dealing with a narrow, precise, and specific subject is not submerged by a later enacted statute covering a more generalized spectrum."[13]

For similar reasons, in *United States v. United Continental Tuna Corp.*, 425 U.S. 164, 169 (1976), the Court held that an amendment to the Suits in Admiralty Act did not authorize the bringing of claims otherwise barred by the Public Vessels Act. In the absence of "some expression by Congress that such results are intended," it declined to find a legislative decision to "compromise or abandon[ ] . . . previously articulated policies."

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13 In such circumstances, the silence of the legislative history "is most eloquent, for such reticence while contemplating an important and controversial change in existing law is unlikely." *Edmonds v. Companie Generale Transatlantique*, 443 U.S. 256, 266-67 (1979).

And, in *Train v. Colorado Public Interest Research Group*, 426 U.S. 1, 23-24 (1976), the Court held that nuclear materials were not subject to regulation by the Federal Water Pollution Control Act ("FWPCA") even though, on its face, FWPCA appeared to encompass such materials. Pointing to the pervasive regulation of nuclear materials by the Atomic Energy Act, it found the legislative history of FWPCA did not contain "the clear indication of legislative intent that we might expect before recognizing such a change in policy."

This narrowing of a statute's scope operates forcefully when private rights are fully protected by existing federal legislation. Thus, in *International Brotherhood of Teamsters v. Daniel*, 439 U.S. 551 (1979), the federal securities laws were held inapplicable to pension plans which were regulated by the more precisely drawn ERISA statute. It was noted that, unlike "the Securities Acts, ERISA deals expressly and in detail with pension plans" and that, in light of the "existence of this comprehensive legislation" it would "serve[ ] no general purpose" to apply the securities laws to pension plans. 439 U.S. at 569-70. *See also Marine Bank v. Weaver*, 455 U.S. 551, 556-59 (1982), determining that certificates of deposit did not qualify as "securities" within the meaning of the Securities Exchange Act of 1934 because the purchasers of those certificates were "abundantly protected" by the federal banking laws.

The approach of the Court below ignored the fact that, without a judicial delineation of standing limitations, the categories of claimants who may pursue RICO claims are limitless. Its approach may not, in the circumstances, be viewed as an appropriate exercise of deference to legislative judgment. The Second Circuit failed to recognize the significance of the fact that Congress did not anticipate the application of private civil RICO in the manner in which it is being used. The application of traditional standing limitations to RICO claims would therefore be in accord not only with Congress' intent but also with accepted canons of statutory interpretation.[14]

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14 *See, e.g., International Data Bank Ltd. v. Zepkin, supra*, 812 F.2d at 152-53, noting that Congress did not write the RICO statute in a vacuum

E. Deferring the Accrual of A Creditor's RICO Claim Does Not Ameliorate The Detrimental Impact On The Bankruptcy Process

The Court below purported to recognize the need to protect the bankruptcy process against claims which might interfere with marshalling a debtor's assets, pointing to the fact that, during the pendency of a bankruptcy proceeding, creditors are precluded from pursuing their own claims. 859 F.2d at 1100, 1101; App. 8a, 10a-11a. This preclusion exists to protect the integrity of a debtor's estate, which otherwise would be subject to numerous separate proceedings in which creditors struggled for priority through the pursuit of individual claims. *Id.*; *see also* 676 F. Supp. at 501; App. 32a-33a.

In an ultimately futile attempt to avoid disruption of this well-established principle of bankruptcy policy, the Court below concluded that accrual of a creditor's individual RICO claim could be deferred until "after the claims that [the creditor] has in common with [the debtor] are dealt with by the bankruptcy court—through recovery of all or part of [the debtor's] assets, an order of abandonment, or some other final disposition of the lost-debt claims." 859 F.2d at 1106; App. 22a. In its view, so long as a creditor could not commence its own RICO action until the bankruptcy proceeding has terminated, any threat of interference with the bankruptcy process would be avoided.

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and viewing as significant the virtual unanimity with which lower courts had limited standing under Section 10(b) of the Securities Exchange Act of 1934 to purchasers or sellers:

> If Congress had intended the drastic result of overturning this consensus, it surely would have done so in a more explicit way. . . . Where a predicate offense already had a well-developed private right of action under federal law, we think the better view is that Congress meant for RICO to expand the range of remedies by allowing for treble damages and attorneys' fees, rather than to summarily overturn the settled law.

As shown in the *Gochenour* cases, *supra*, the principle under which a creditor cannot pursue its own right to relief during the pendency of a bankruptcy proceeding is, at a minimum, nearly 50 years old.

As shown below, this facile device is not supported by any precedent. Moreover, at least insofar as the possibility of settlement is concerned, conferring standing in a deferred manner is no less destructive than permitting creditors to pursue actions while a bankruptcy proceeding is pending. The likelihood of future RICO claims by creditors will necessarily diminish, if not practically eliminate, all prospects of meaningful settlements with third parties allegedly liable to debtors' estates.[15]

The bankruptcy laws traditionally have sought to prevent an objecting creditor from gaining an unfair preferential advantage over other creditors. *See, e.g., Young v. Higbee Co.*, 324 U.S. 204, 210 (1945) ("[O]ne of the prime purposes of the bankruptcy law has been to bring about a ratable distribution among creditors of a bankrupt's assets; to protect the creditors from one another"). Following the decision below, debtors-in-possession, trustees or others seeking to settle with parties charged with depleting a debtor's assets will find their ability to enter an agreement impaired. No longer will the rights of minority creditors opposing settlements be limited to their shares of any settlement proceeds. Instead, under the decision below, those creditors will gain leverage to seek a disproportionate share of any settlement proceeds by threatening individual RICO actions against the alleged wrongdoers. Because no one would be willing to settle with a debtor's estate without releases from the threatening creditors, those who support a settlement will be forced to pay an unfair tribute to accomplish one.

Thus, the Second Circuit's refusal to apply standing limitations here not only will open the courts to claims previously barred by well-established principles of law, but will, in addition, cause major disruptions to the bankruptcy settlement process.

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15 Shortly after the decision below was filed, it was applied to require the dismissal without prejudice of a RICO claim asserted by a creditor while a bankruptcy proceeding was pending. *L'Europeene de Banque v. La Republica de Venezuela*, [Current] RICO Business Disputes Guide (CCH) ¶ 7055 (S.D.N.Y. 1988). As time passes, other creditors are likely to threaten the assertion of "loss of legitimate debt" claims under RICO.

II. BOTH THE CONFLICT BETWEEN THE SECOND CIRCUIT AND THE THIRD CIRCUIT AS TO THE ACCRUAL OF A RICO CLAIM AND THE AVAILABILITY OF THE SPECULATIVE DAMAGES EXCEPTION TO DEFER THAT ACCRUAL PRESENT IMPORTANT QUESTIONS OF FEDERAL LAW WHICH HAVE NOT BEEN BUT SHOULD BE SETTLED BY THIS COURT

As stated in *Wilson v. Garcia*, 471 U.S. 261, 266, 271 (1985):

> "Few areas of the law stand in greater need of firmly defined, easily applied rules than does the subject of periods of limitations." *Chardon v. Fumero Soto*, 462 U.S. 650, 667 (1983) (Rehnquist, J., dissenting).
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> A federal cause of action "brought at any distance of time" would be "utterly repugnant to the genius of our laws." *Adams v. Woods*, 2 Cranch 336, 342 (1805). Just determinations of fact cannot be made when, because of the passage of time, the memories of witnesses have faded or evidence is lost. In compelling circumstances, the wrongdoers are permitted to assume that their sins may be forgiven.

Wilson shows that courts should hesitate before fashioning principles of limitations which serve to lengthen, especially without a fixed end point, the period during which parties may commence actions to redress violations known to them for many years. Generally, applicable periods of limitations are not extended unless plaintiff lacks knowledge of the wrongdoing or its injury therefrom, is under an infirmity, or seeks relief from a party not subject to process. Prior to the decision below, no court had held that an action pending for many years, seeking damages for alleged injuries which, to plaintiff's knowledge, it had incurred many years before the action was filed, was premature so as to support a dismissal without prejudice to the filing of a new action at an indeterminate point in the future.

Although the Second Circuit correctly determined the accrual principle to govern civil RICO claims, so much of its decision as held Bankers' loss of a legitimate debt claim premature violated the policy expressed in *Wilson* and, at the same time, misunderstood the manner in which conflicts between RICO and the federal bankruptcy laws should be resolved. In ignoring the admonition in *Sedima*, 473 U.S. at 490 n. 9, against the development of principles leading to the "pursuit of stale claims, complex statute of limitations problems, or the wasteful splitting of actions, with resultant claim and issue preclusion complications," the Second Circuit has created an unworkable doctrine which should be rejected by this Court.

A. Under The Rule Of Separate Accrual, RICO Claims For Injuries Known For More Than Four Years Are Barred

In *Agency Holding Corp. v. Malley-Duff & Associates, Inc.*, ____ U.S. ____, 107 S. Ct. 2759 (1987), the Court, following the model of the Clayton Act, adopted a four-year statute of limitations for RICO claims. Because the earliest date the claim could have accrued was well within that period, it expressly left open the question of when a civil RICO claim accrues. *See* 859 F.2d at 1102; App. 12a, citing 107 S. Ct. at 2767. Since *Malley-Duff*, lower courts have determined the commencement of the period of limitations in various ways.

The Court below (859 F.2d at 1105; App. 19a-20a) selected what it termed a "rule of separate accrual." Under that rule,

> each time plaintiff discovers or should have discovered an injury caused by defendant's violation of § 1962, a new cause of action arises as to that injury, regardless of when the actual violation occurred. A plaintiff, under *Malley-Duff*, must then bring his action within four years of this accrual to recover damages for the specific injury. Naturally, as with all rules of accrual, the standard tolling exceptions apply.

Claims for injuries known to plaintiffs more than four years before the action is commenced are time-barred.

In adopting the rule of separate accrual, the Second Circuit rejected other theories of accrual approved by lower courts, such as the general federal rule,[16] the continuing violation doctrine—applied by the District Court in this case (859 F.2d at 1102; App. 13a, citing 648 F. Supp. at 86)—and rules measuring the limitations period from the date of the last predicate act, the first overt act causing damage, or the date of each injury. 859 F.2d at 1102; App. 12a-13a, and cases cited therein. Instead, aligning itself with *State Farm Mutual Automobile Ins. Co.* v. *Ammann*, 828 F.2d 4, 5 (9th Cir. 1987), it held that each time a plaintiff discovers or should have discovered its RICO injury, a new cause of action accrues to recover those damages. 859 F.2d at 1103; App. 15a-16a.

In a concurring opinion in *State Farm*, Judge Kennedy stated that "as to each injury the civil RICO statute of limitations period begins to run when the plaintiff knows or has reason to know of the injury which is the basis of the action." He noted that the Ninth Circuit had not decided "the extent to which separate injuries sustained within the limitations period might be actionable despite the existence of some time-barred causes of action." In such circumstances, according to Judge Kennedy (828 F.2d at 5), the following rules should apply:

> a cause of action accrues when new overt acts occur within the limitations period. . . . A corollary rule is that damages may not be recovered for injuries sustained as a result of acts committed outside the limitations period. (citations omitted).

State Farm followed the Ninth Circuit's earlier decision in *Compton* v. *Ide*, 732 F.2d 1429 (9th Cir. 1984). *Compton* and other Ninth Circuit cases, such as *Beneficial Standard Life Ins. Co.* v. *Madariaga*, 851 F.2d 271, 275 (9th Cir. 1988) and *Volk*

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16 The general federal rule

> requires in cases involving continuing violation and continuous injury that the statute of limitations begin running upon the commission of the first overt act causing damage, and does not permit a subsequent injury to start the limitations period running anew. *Id.* at 1104-05; App. 18a.

v. D.A. Davidson & Co., 816 F.2d 1406, 1415 (9th Cir. 1987), hold that the RICO period of limitations does not begin to run until plaintiff discovered or should have discovered its injury. But, prior to the decision below, the only Court of Appeals decision addressing the treatment of RICO claims based upon separate injuries—some known to plaintiff more than four years before its action was filed and some not—was the concurrence in *State Farm*.[17] Subsequent to the decision below, however, the Third Circuit has addressed that issue and reached a different conclusion.

B. Under The Third Circuit's Rule, RICO Claims For Injuries Known For More Than Four Years Are Timely So Long As Any Predicate Act Occurs Within The Limitations Period

In *Keystone Insurance Co. v. Houghton*, 1988 WL 132681 (3d Cir. Dec. 15, 1988), the Third Circuit specifically rejected the rule of separate accrual adopted by the Second Circuit. It concluded (at 5) that RICO

> should not be interpreted to preclude actions based on injuries occurring outside the limitations period if injuries that are derived from the same pattern of racketeering are within the limitations period [or if] predicate acts . . . committed within the limitations period . . . are part of the same pattern [as the predicate acts causing those injuries].

The Third Circuit concluded (at 5-6) that the period of limitations begins to run from the date when plaintiff knew or should

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17 The other Courts of Appeals which addressed the accrual question have not addressed the separate injury question. *Hunt v. American Bank & Trust Co.*, 783 F.2d 1011, 1015 (11th Cir. 1986); *Bowling v. Founders Title Co.*, 773 F.2d 1175, 1178 (11th Cir. 1985), *cert. denied*, 475 U.S. 1109 (1986); *Pocahontas Supreme Coal Co. v. Bethlehem Steel Corp.*, 828 F.2d 211, 220 (4th Cir. 1987). *See also LaPorte Construction Co. v. Bayshore National Bank*, 805 F.2d 1254, 1256 (5th Cir. 1986). *Cf. Alexander v. Perkins Elmer Corp.*, 729 F.2d 576 (8th Cir. 1984) (applying Missouri law).

have known that both its injury and "the elements of the civil RICO cause of action existed." Moreover, if further injuries or further predicate acts occur, the period will not begin to run until

> plaintiff knew or should have known of the last injury or the last predicate act which is part of the same pattern of racketeering activity. The last predicate act need not have resulted in injury to the plaintiff but must be part of the same pattern. If the complaint was filed within four years of the last pattern or last predicate act, the plaintiff may recover for injuries caused by other predicate acts which occurred outside an earlier limitations period but which are part of the same "pattern."

As recognized by the Third Circuit (at 8, 11-12 n. 5), *Keystone*'s accrual standard is practically indistinguishable from the one applied by the District Court in its 1986 decision in this case (648 F. Supp. at 35-38; App. 69a-74a), which the Second Circuit, in reversing, refused to adopt. Thus, *Keystone* not only specifically conflicts with the decision below but the decision below, in refusing to adopt the District Court's standard, conflicts, at least by implication, with the rationale subsequently followed in *Keystone*.

Significantly, while the Second Circuit's rule of separate accrual appears far more consistent with the principles of *Wilson v. Garcia* than *Keystone*,[18] that consistency disappeared as soon as the Second Circuit concluded that a speculative damages exception, purportedly drawn from *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321 (1971), is applicable to defer the accrual of RICO claims.

The standard appropriate for determining the accrual of RICO claims presents an issue of growing importance which this Court ought to resolve now, especially in light of the con-

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18 Although *Keystone* (at 12 n. 6) purported to be "mindful" of the observation in *Wilson* against facilitating the litigation of stale claims, its view of the "organic" relationship of RICO, as reflected by what "the statute clearly intends," led it to adopt a last predicate act standard of accrual which has the effect of preserving stale claims.

flict between the Second and Third Circuits. At the same time, the availability of a speculative damages exception to the accrual of RICO claims also should be addressed. As applied by the Second Circuit, this exception improperly permits the pursuit of RICO claims for injuries known to plaintiffs prior to both the four-year period specified in *Malley-Duff* and the ten-year period recognized in *Keystone*.[19]

C. Time-Barred RICO Claims May Not Be Preserved Under The Speculative Damages Exception Simply Because Plaintiff's Damages May Be Reduced By A Recovery In Another Action

The Second Circuit's rule of separate accrual bars RICO claims for injuries known to plaintiffs more than four years before an action is commenced. As applied here, that rule bars claims for past "legal fees and other expenses which Bankers discovered or should have discovered before" August 1978, more than four years before it filed its RICO action; thus, the Second Circuit properly instructed the District Court to dismiss those claims. 859 F.2d at 1105; App. 20a. However, when considering Bankers' loss of a legitimate debt claim, based upon an an injury which Bankers admittedly discovered nearly two years before the August 1978 cutoff, it ordered a dismissal "without prejudice to refiling after the Bankruptcy Court has finally disposed of the corporation's claim based on the same underlying transactions." *Id.* at 1107; App. 23a.

The Second Circuit reached this conclusion because of the possibility that BAC might recover for the same wrongdoing: "Bankers would benefit along with BAC's other creditors and its injury would decrease" following such a recovery. As a result, it characterized Bankers' damages on its loss of a legitimate debt claim as " 'unrecoverable' . . . because 'their accrual is speculative' and 'their amount and nature unprovable' " and, despite the fact that it "[n]ormally" would have ordered that claim dismissed, the Second Circuit concluded that

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19 "[T]here is inherent in [18 U.S.C. § 1961(5)] a ten year limit on the point at which the last predicate act for purposes of accrual may occur." *Keystone*, at 8.

it would not accrue until the BAC bankruptcy proceeding was completed. 859 F.2d at 1105-06; App. 20a-22a. It wrote (*id.* at 1106; App. 22a):

> Consequently, after the claims that Bankers has in common with BAC are dealt with by the bankruptcy court—through recovery of all or part of BAC's assets, an order of abandonment, or some other final disposition of the lost-debt claims—Bankers' injury will be ascertainable, an action as to the injury will accrue, and Bankers will then have four years to bring a civil RICO action to recover the damages it has suffered in this area, subject of course to the normal rules and procedures governing such claims.

As shown below, Second Circuit misread the speculative damages exception set forth in *Zenith* and, in applying its version of that exception to RICO, improperly extended it beyond any reasonable bounds.

As set forth in *Zenith*, 401 U.S. at 339, the speculative damages exception provides as follows:

> In antitrust and treble-damage actions, refusal to award future profits as too speculative is equivalent to holding that no cause of action has yet accrued for any but those damages already suffered. In these instances, the cause of action for future damages, if they ever occur, will accrue only on the date they are suffered; thereafter the plaintiff may sue to recover them at any time within four years from the date they were inflicted.

The speculative damages exception was crafted to remedy a perceived problem with the ability of antitrust plaintiffs to recover damages for projected lost profits arising from improper market exclusion. Zenith sought damages under the antitrust laws for Hazeltine's unlawful participation in patent pools which had the effect of excluding Zenith from certain markets. Some of the injuries inflicted during the limitations period arose from conspiratorial conduct outside that period. Concluding that claims for projected lost profits extending more than five years into the future would have received "short

shrift'' had Zenith brought suit at the time its initial injuries were inflicted—even though, when Zenith's later-filed action was tried, those same claims were subsequently proven—the Court refused to view those claims as time-barred. 401 U.S. at 341-42. Because Zenith's anticipated damages for lost profits would have been so speculative at the time its initial injuries were inflicted, no claim to recover those damages would have accrued at that time.

Many courts have hesitated to apply the speculative damages exception to the accrual of antitrust claims even where projected lost profits are sought. In *Brunswick Corp. v. Riegel Textile Corp.*, 752 F.2d 261 (7th Cir. 1984), *cert. denied*, 472 U.S. 1018 (1985), a company charged a textile manufacturer with procuring a patent by fraud and thereafter monopolizing production of the patented product. The Seventh Circuit, concluding that plaintiff should have sued when defendant procured the patent, held the action time-barred. It rejected the argument that the speculative damages exception applied because the plaintiff's damages were uncertain at that time:

> *Zenith* has not been understood to toll the antitrust statute of limitations in every case where the plaintiff is seeking damages for being excluded from a market the profitability of which will be revealed only in the fullness of time. . . . Exclusion from a market is a conventional form of antitrust injury that gives rise to a claim for damages as soon as the exclusion occurs . . . even though, in the nature of things, the victim's losses lie mostly in the future. *Id.* at 271.

Plaintiff could have proven its damages with sufficient certainty had it brought its action within a limitations period unextended by the speculative damages exception. It could have received a judgment directing defendant to disgorge its profits to that point in time and to transfer its patent to plaintiff to avoid additional damages in the future.

In *Barnosky Oils, Inc. v. Union Oil Co.*, 665 F.2d 74, 82-83 (6th Cir. 1981), plaintiff, an oil wholesaler, claimed that its supplier had compelled it to terminate its relationship with a competitor of the supplier as a condition to increasing its maximum

oil allocation. The Sixth Circuit held that the speculative damages exception was inapplicable because plaintiff's claim had accrued when the condition was imposed. Rejecting plaintiff's argument that its claim had not accrued, the Court noted that even the uncertainty of market conditions caused by the Arab oil embargo affected only the calculation of damages and would not have prevented a recovery. According to the Sixth Circuit, even though

> uncertain market conditions . . . certainly would have affected those calculations, had Barnosky brought suit during that period of time . . . . it is well settled that mere uncertainty as to the extent or amount of damages will not bar recovery under the antitrust laws. *Id.* at 83, citing *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 562 (1931).

Courts refusing to apply the speculative damages exception recognize that *Zenith* did not promulgate a new standard for determining whether damages are speculative. For example, in *Aurora Enterprises, Inc. v. National Broadcasting Company, Inc.*, 688 F.2d 689 (9th Cir. 1982), a television production company sought relief for an illegal tying arrangement violating the antitrust laws. It claimed that defendant imposed as a condition to its purchase of plaintiff's network exhibition rights a right to purchase plaintiff's syndication rights as well. In holding the action time-barred because defendant had purchased the rights more than four years before the action was filed, the Ninth Circuit rejected plaintiff's argument that the speculative damages exception applied, concluding that the harm complained of was certain as soon as the contract was signed. "Mere uncertainty as to the extent or amount of damages will not bar recovery under the antitrust laws." 688 F.2d at 694, citing *Story*, *supra*, 282 U.S. at 562.

See also In re Multidistrict Vehicle Air Pollution, 591 F.2d 68, 73 (9th Cir.), *cert. denied*, 444 U.S. 900 (1979) (distinguishing between uncertainty as to the existence of damage, which prevents recovery, and uncertainty as to the extent of damage, which does not—"that is, the failure to establish any injury,

from the not uncommon imprecision with regard to its scope"); *Charlotte Telecasters, Inc. v. Jefferson-Pilot Corp.*, 546 F.2d 570, 573 (4th Cir. 1976) (under *Story*, when wrong has been proven, juries may render verdicts based on reasonable estimates of damage).

The decision below improperly extends the speculative damages exception beyond the areas of antitrust and projected lost profits. As stated in *Fitzgerald v. Seamans*, 553 F.2d 220, 227 (D.C. Cir. 1977):

> The *Zenith* doctrine arose in and has been confined to the area of antitrust treble damage recovery for lost profits. The *Zenith* exception to the statute of limitation is necessitated by the intersection of the traditional requirement of reasonable certainty of proof of lost profits and the strong congressional policy in favor of antitrust enforcement by private damage suits.

One court has explicitly held the *Zenith* exception inapplicable to a civil RICO action. In *5 Penn & Co. II v. Shearson Lehman Brothers, Inc.*, 1987 WL 19591 (E.D. Pa. 1987), a limited partner in an oil investment brought a RICO action alleging, as the underlying predicate acts, misrepresentations in violation of the federal securities laws in the marketing of the offering. To avoid the limitations bar, plaintiff argued that its claim did not accrue until the limited partnership became subject to bankruptcy proceedings.

The Court held (at 4) that plaintiff could have shown the worthlessness of its investment when it showed that it had relied on a material misrepresentation. Further, "even if the ultimate value of the investment was to some degree speculative until the . . . bankruptcy, plaintiff's damages based on a securities fraud claim were not speculative."[20]

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20 Several courts have refused to hold that the pendency of other proceedings renders damages so uncertain that deferral of the accrual of a separate claim is warranted. *See, e.g., Brunswick, supra*, 752 F.2d at 268, rejecting as "bizarre" the claim that any judicial action would have been "premature" prior to the termination of proceedings in the Patent Office and questioning

(footnote continued on next page)

Even if this Court should determine that, under appropriate circumstances, the speculative damages exception may be extended to RICO, the Second Circuit's application of it here was improper. Bankers' damages were not "speculative" in the sense that those in *Zenith* were, nor were they speculative in any other sense. The only uncertainty about the damages from Bankers' loss of a legitimate debt claim is the ultimate amount payable to Bankers, assuming it were to receive a favorable judgment in this action—that is, whether those damages might be reduced by any distribution to Bankers of its share of a recovery by the BAC estate.

The speculative damages exception may be invoked to avoid dismissal on limitations grounds of antitrust claims for projected lost profits arising from wrongdoing initially inflicted outside the limitations period. When a court believes that those claims would have failed if filed relatively contemporaneously with the wrongdoing, it may entertain an action filed at a later date. In other words, if plaintiff could not have demonstrated its entitlement to projected lost profits until a point which is timely if measured by a period of limitations computed back from the date on which its action is filed, the claims are not time-barred. Imposition of a limitations bar in these circumstances would be inequitable—speculative and unproveable claims do not become stale and time-barred unless plaintiff

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> the wisdom of allowing a plaintiff to wait for the unexpired portion of the statute of limitations to expire after the agency proceedings are complete before he sues, rather than suing if need be while those proceedings are going on and staying the suit till they have been completed.

See also Fitzgerald, supra, 553 F.2d at 226-27 (claim in action for wrongful discharge was independent of Civil Service Commission remedy and accrued upon discharge "even though the extent and precise nature of the injury had not yet developed"); *Mir v. Little Company of Mary Hospital*, 844 F.2d 646 (9th Cir. 1988) (physician's antitrust action against hospital for loss of future earnings resulting from denial of privileges accrued prior to disposition of state court action for injunctive relief); *Ohio-Sealy Mattress Mfg. Co. v. Kaplan*, 745 F.2d 441 (7th Cir. 1984), *cert. denied*, 471 U.S. 1125 (1985) (disposition of divestiture proceeding did not affect right to future damages).

receives a meaningful opportunity to pursue them after they first become proveable and timely.

The situation here bears no resemblance to that addressed by the speculative damages exception. In its loss of a legitimate debt claim, Bankers does not seek lost profits, proof of which would have been speculative as of August 1978, four years before this action was filed. Instead, the damages relevant to its claim always have been subject to simple quantification—the amount of the debt claimed to have been wrongfully discharged by the bankruptcy court's 1976 approval of the BAC plan of reorganization.

The possibility that Bankers might receive a recovery in one proceeding reducing or eliminating its right to a recovery in another provides no support for any exception to the principles of accrual governing the periods of limitation applicable to either claim. The simple fact is that when Bankers moved to revoke the BAC plan in 1976, RICO had been violated, Bankers had been injured and Bankers knew of its injury. Thus, any right Bankers had to file its own RICO action in the District Court expired in 1980, nearly two years before it filed the present action. Any right to recover from the alleged wrongdoer can only be realized from a distribution of the proceeds of a judgment or settlement of a claim by BAC on behalf of all of its creditors.

Courts should hesitate to apply the speculative damages exception to support the dismissal of an action without prejudice to the filing of a new action at an indeterminate date in the future. In *Zenith* and the cases which follow it, the exception is applied to determine whether a pending action is time-barred because an earlier hypothetical action might have been timely. In the Second Circuit's view, Bankers' loss of a legitimate debt claim is the counterpart to the hypothetical earlier action in *Zenith*—just as that hypothetical action did not have to be brought to avoid a limitations bar because Zenith's claim had not accrued, the Second Circuit believed that Bankers did not have to bring this action because its claim had not accrued.

This logic turns *Zenith* on its head—instead of an equitable rationale enabling courts to address the merits of a pending claim where an earlier failure to file may be excusable, the deci-

sion below permits a court to sidestep the merits of claims litigated for many years by deferring their determination to an unknown point in the future. The Second Circuit has created a device which, without logic, law or equity to support it, effects a legal transmigration, creating an unborn potential claim out of a time-barred claim.

CONCLUSION

For the foregoing reasons, Soifer respectively requests that this Court issue a writ of certiorari to review the decision of the United States Court of Appeals for the Second Circuit.

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